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IN THE

Supreme Court of the United States

October Term 1962

No. [redacted] 194

NATALE EVOLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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NATALE EVOLA,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI

Petitioner, Natale Evola, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (*sub nom. United States* v. *Aviles,* 315 F. 2d 186) on March 8, 1963 (see *infra* as to the order below upon rehearing).

As further noted *infra* this petition is companion with those of several other petitioners who were appellants in the *Aviles* case, *supra,* in the Court below.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in the Appendix hereto, *infra,* is reported at 315 F. 2d 186. Two relevant opinions of the United States District Court for the Southern District of New York, printed in the Appendix to, or otherwise supplied in connection with, the companion petition for cer-

tiorari which is being filed herein on behalf of petitioner Vito Genovese, are reported at 197 F. Supp. 596 and 200 F. Supp. 711. Another opinion of the United States Court of Appeals for the Second Circuit, which was rendered in connection with a prior stage of this matter and which led to prior petitions for certiorari (362 U. S. 974, 982, rehearing denied 363 U. S. 858), is reported at 274 F. 2d 179.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered March 8, 1963 (Appendix hereto, *infra*). A petition for rehearing, filed March 22, 1963, was denied by the Court of Appeals on April 10, 1963. By order of May 8, 1963 the Honorable John M. Harlan, Associate Justice of this Court, extended the time for filing a petition for a writ of certiorari on behalf of petitioner Evola to and including June 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner Evola adopts the respective "Questions Presented" in the companion petitions for certiorari which are being filed on behalf of other petitioners in this case, especially the "Questions Presented" in the petition of Vito Genovese. Supplementarily, petitioner Evola formulates the following questions:

1. Under the test enunciated by this Court in *Campbell v. United States*, No. 631, October Term, 1962, decided May 27, 1963, under other applicable decisions of this Court, and

under applicable statutory (18 U.S.C. § 3500) and constitutional (Fifth Amendment— due process of law) requirements, did the Court below err in redetermining *de novo* the factual questions which had been determined by District Judge Murphy in regard to the producibility under the Jencks Act of certain interview notes of Assistant United States Attorney Shaw, and in reversing Judge Murphy's conclusion that those notes were producible?

2. If it was error for the Court below to make the redetermination as to producibility mentioned in our preceding question, does not petitioner Evola stand fatally prejudiced by Judge Murphy's other determination (not reached for review by the Court below) that non-production of the Shaw interview notes which Judge Murphy had found producible was not prejudicial in that defendants' rights of cross-examination were not "unduly restricted" thereby? Did not this hitherto unreviewed ruling of non-prejudiciality misapply the test of harmless error laid down by this Court in *Rosenberg* v. *United States*, 360 U. S. 367, 370?

3. In the overall setting of the "Jencks Act" rulings of both Courts below with respect to the Shaw interview notes, does not this case present what Circuit Judge Charles E. Clark recently termed the "very evil which the Supreme Court has continually repudiated", namely, "that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination" (*United States* v. *Cardillo, et al.*, 2nd Cir., decided April 24, 1963, concurring op., slip opinion at pp. 3414-3415)?

Constitutional and Statutory Provisions Involved

The case involves the Due Process Clause of the Fifth Amendment of the Federal Constitution. It also involves 18 U.S.C. § 3500 (the "Jencks Act"), which we do not print herein because it is printed in the companion petition for certiorari on behalf of Vito Genovese.

Statement of the Case

(Our statement of the case in this petition is abbreviated because a full statement, which we hereby adopt, is presented in the petition of Vito Genovese. Except as otherwise indicated, all of our recitals of fact *infra*, are taken from the opinions of the Courts below which were cited *supra* under the heading "Citations to Opinions Below".)

Petitioner Evola and the other petitioners herein were convicted, after a three months' jury trial in the Southern District of New York, of conspiracy to violate Federal narcotic laws. Their convictions were affirmed by the Court below (274 F. 2d 179), and this Court denied certiorari (*Evola* v. *United States*, 362 U. S. 974, 982, rehearing denied, *Genovese* v. *United States*, 363 U. S. 858).

The aforementioned convictions occurred on April 17, 1959. On August 26, 1960, the within petitioners (including Evola) moved in the District Court for a new trial pursuant to Rule 33, F. R. Cr. P. The grounds of those motions for new trial were (as summarized in the opinion of the Court below on the judgment here sought to be reviewed—315 F. 2d at p. 188):

> "* * * (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantel-

lops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500."

District Judge Bicks, who had presided at the original narcotics trial, conducted hearings upon the motions for new trial, and he denied those motions insofar as they rested upon grounds 1 through 6 as above quoted (197 F. Supp. 536). Judge Bicks reserved decision as to the above quoted ground no. 7—involving the Shaw interview notes—indicating that he intended to take further testimony on this issue. Judge Bicks becoming ill, such further testimony, which was to have been taken by *voir dire* examinations, was not taken before Judge Bicks. Instead, District Judge Murphy was assigned to the further conduct of the hearing and to make a determination as to the ground upon which Judge Bicks had reserved decision. Thereafter Judge Murphy denied the motions for a new trial (200 F. Supp. 711). On appeal to the United States Court of Appeals for the Second Circuit, Judge Bicks' rulings and

Judge Murphy's order denying the motions for a new trial were affirmed (315 F. 2d 186). The within several companion petitions for certiorari seek review of the last-mentioned judgment of affirmance.

We shall not burden the Court with factual recitals concerning the issues presented by the above quoted new trial grounds 1 through 6—as to which the Court below affirmed (315 F. 2d at p. 188) on the opinion of Judge Bicks (197 F. Supp. 536) without further discussion—because this aspect of the case is sufficiently treated in the companion petition of Vito Genovese. Although the Genovese petition likewise treats the above quoted ground no. 7—relating to the Shaw interview notes—we shall refer briefly herein to that part of the case.

As noted in the opinion below (315 F. 2d at p. 189), Judge Murphy had separated the Shaw material into three groups, the second and third of which are referred to as follows in the opinion below (*ibid*):

> "(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the [ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'
>
> (3) Notes which 'most assuredly should have been produced pursuant to § 3500.' This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of

these notes did not prejudice defendants' interests in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby:

> '* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occasion * * * would simply add umber to an already blackened witness.' 200 F. Supp. at 717."

In the appeal below it was contended on the part of the within petitioners (including Evola) that, as regards the portion of the Shaw materials which Judge Murphy found "probably Jencks statements" but "virtually" consistent with the Grand Jury testimony, numerous discrepancies did in fact exist between the Shaw notes and the Grand Jury minutes (Brief in the Court below on behalf of Vito Genovese at pp. 65-97); and as to the portion of the Shaw materials which Judge Murphy found "most assuredly should have been produced" but whose non-production he found non-prejudicial, the within petitioners urged in the Court below that Judge Murphy had misapplied the test of harmless error laid down in *Rosenberg* v. *United States*, 360 U. S. 367, 370 (Brief of Genovese just cited, pp. 15-59).

The Court below did not reach the question of the consistency of the "probably" producible Shaw materials with

the Grand Jury testimony, nor did it reach the question of the prejudicial effect of non-production of the "most assuredly" producible items, because, instead, the Court below resolved the issues of the appeal in regard to the Shaw materials by arriving at a *de novo* finding of its own to the effect that neither the Shaw materials which Judge Murphy had deemed "probably" producible nor those which he had deemed "most assuredly" producible were actually producible at all under the Jencks Act. In support of this conclusion, the Court below stated (315 F. 2d at p. 191—footnote omitted):

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions. As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below."

Having thus determined that its powers of review allowed it to make independent findings on the issue of producibility, the Court below went on in its opinion herein to conclude that the Shaw materials were not "a substantially verbatim recital" because, *inter alia,* Cantellops' speech was difficult to understand and transcribe, the Shaw notes were not read back to Cantellops, Cantellops never signed nor initialed them, some of the notes did not deal solely

with Cantellops' statements, Mr. Shaw's practice had been to edit and add to the notes, and Mr. Shaw had been selective in his note-taking (315 F. 2d at pp. 191-192).

The importance, to petitioner Evola, of the opportunity which would have been afforded at the narcotics trial to adduce further impeachment of the credibility of Cantellops with the aid of the Jencks Act materials held nonproducible by the Court below and non-prejudicial by Judge Murphy (who, however, as seen, had held them producible), may be gathered from various statements in the two opinions written by the Court below in this case (274 F. 2d 179 and 315 F. 2d 186), where Cantellops' central and principal role as the Government's indispensable accusing witness, as well as his base credibility, are repeatedly noted. And, we respectfully emphasize, it is undisputed that, except for the testimony of the basely discredited accomplice witness Cantellops, there is not so much as a scintilla of evidence inculpating the petitioner Evola under this single-count conspiracy indictment.

Reasons for Granting the Writ

1. The case is a compelling one for the exercise of this Court's power of supervisory administration of the Jencks Act procedures. Had the rulings below gone no farther than they were carried in Judge Murphy's determinations —i.e., had the case below stopped with the determination that non-production of the producible materials was not prejudicial—the case would be a compelling one for certiorari simply on the basis that it is for defense counsel, not for a trial court, to evaluate what is tactically useful for the defense in Jencks Act producible materials. *Scales*

v. *United States,* 367 U. S. 203, 258; *Palermo* v. *United States,* 360 U. S. 343, 346; *Jencks* v. *United States,* 353 U. S. 657, 668-669.

However, the case below has not stopped with merely those rulings as to *non-prejudiciality.* The case below has gone onward, in the forum immediately below, to develop also a ruling and a doctrine of *non-producibility* which strongly enhances the need for certiorari. The undertaking by the Court below to make a *de novo* determination as to producibility seems difficult to reconcile with this Court's decision in *Campbell* v. *United States,* no. 631, October term 1962, decided May 27, 1963, where the Court, in referring to certain of the issues of producibility in that case, said: "We think these questions properly are ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous". We do not read this Court's language in the aforementioned second *Campbell* decision as contemplating any different or larger measure of appellate review of a trial court's finding of producibility where the trial judge dealt with a written record rather than oral testimony. On the contrary, this Court's language in *Campbell II* denotes that what essentially counts in this area is, precisely, the factor of the location of the trial or *nisi prius* judge in the place which he occupies in the judicial hierarchy—see the Court's reference (quoting from the *Palermo* case, *supra*) to "the good sense and experience of the district judge" and "the appropriately limited review of appellate courts"; see also the Court's reference (again, in *Campbell II,* quoting partially from *Palermo*) to the need for the trial judge's "*ad hoc* appraisal of one of the 'myriad * * * possible permutations of fact and circumstance' * * *

present in such cases''; and finally, see this Court's additional language from *Campbell II* where it noted how these determinations of Jencks Act producibility concern ''a subject, rulings on evidence, which is peculiarly the province of trial courts''. This last, in particular, would obviously not be affected by the circumstance of the trial judge's having dealt with a written record rather than the testimony of witnesses who appeared before him on the stand.

Very recently Circuit Judge Charles E. Clark, concurring in *United States* v. *Cardillo, et al.*, 2nd Cir., decided April 24, 1963, spoke words which have a remarkable aptness for the instant situation and which contain a remarkable summons for this Court to intercede in a certain class of Jencks Act cases of which the instant case, we submit, is a prime example (we quote from pp. 3414-3415 of the printed slip opinion in the *Cardillo* case *supra*):

> ''CLARK, *Circuit Judge* (concurring in the result):
>
> We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in *United States* v. *Annunziato*, 2 Cir., 293 F. 2d 373, 382, cert. denied *Annunziato* v. *United States*, 368 U. S. 919, that is only ''harmless error'' not to produce a statement which appears to ''corroborate'' a witness's testimony, or in *United States* v. *Simmons*, 2 Cir., 281 F. 2d 354, 357-358, and the present case that the defense is not entitled to statements relating to purely incidental or collateral aspects of a witness's testimony, or in *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not suffi-

> ciently exact, though to the district judge "probably verbatim," recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted. * * *."

2. Further as to the question of prejudice caused to the defense by non-production of the Shaw interview notes—on which District Judge Murphy ruled that there was no prejudice and on which the Court below found it unnecessary to rule because it deemed the items not producible at all—we refrain from re-threshing the presentation on this subject which is contained in the companion petition of Vito Genovese, but we respectfully call the Court's attention to the language of the Court of Appeals of the State of New York (opinion by Fuld, J.) in the well-known case in which that Court enunciated the equivalent of the Jencks rule for New York State criminal proceedings (*People* v. *Rosario*, 9 N. Y. 2d 286, 290, 213 N. Y. S. 2d 448, 451):

> "Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness,

> are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?
>
> "It is true that defense counsel will undoubtedly be in a position to cross examine at greater length than without such pretrial statements. But there is nothing wrong in this. * * *."*

3. Petitioner Evola respectfully adopts all of the reasons for the granting of certiorari which are presented in the companion petitions, particularly the petition of Vito Genovese.

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* It is true that the Court went on, in the *Rosario* case, *supra*, to hold that non-production of the materials which were held producible had not prejudiced the defendant because "On the record before us, there can be no possible question of the appellant's guilt, even apart from the testimony of the witnesses whose statements had been requested and refused. Not only was there evidence of admission to friends before and after the fatal robbery, not only was there proof of a confession to the district attorney, not only was there evidence of flight, but there was ballistics testimony indicating that the lethal bullet had issued from the appellant's gun. And, of the utmost significance, examination of the prior statements discloses that the few variances contained in them were of a most inconsequential character." As earlier herein noted, the question of petitioner Evola's guilt depended *solely* on the testimony of the execrable Cantellops.

CONCLUSION

For all of the reasons set forth in this petition and in the companion petitions it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM,
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Natale Evola
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[Appendices follow]

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit on judgment sought to be reviewed (as printed in 315 F. 2d 186).

UNITED STATES OF AMERICA,
Appellee,

v.

ALFREDO AVILES et al.,
Defendants-Appellants.

No. 66, DOCKET 27377.

United States Court of Appeals
Second Circuit.

Argued Dec. 18, 1962.

Decided March 8, 1963.

• • • • •

Roy L. Reardon, New York City, for appellant Barcellona.

Albert J. Krieger, New York City, for appellants Joseph Di Palermo, and Charles Di Palermo.

Maurice Edelbaum, New York City, for appellant Evola.

Edward Bennett Williams, Robert L. Weinberg, Washington, D. C.; Wilfred L. Davis, New York City, for appellant Genovese.

Wilfred L. Davis, New York City, for appellant Gigante.

Henry K. Chapman, New York City, for appellants Nicholas Lessa and Rocco Mazzi.

Appendix A—Opinion of the United States Court of Appeals

Allen S. Stim, New York City, for appellant Ralph Polizzano.

Herbert S. Siegal, for appellant Santora.

Vincent L. Broderick, U. S. Atty., Southern District of New York (Arnold N. Enker, Arthur I. Rosett, Richard A. Givens, Asst. U. S. Attys., of counsel), for appellee.

Before WATERMAN, MOORE, and MARSHALL, Circuit Judges.

WATERMAN, Circuit Judge.

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U.S.C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F.2d 179, and the Supreme Court denied certiorari, Evola v. United States, 362 U.S. 974, 982, 80 S.Ct. 1057, 1058, 1059, 1068, 1071, 1073, 4 L.Ed.2d 1009, 1010, 1015, 1016, rehearing denied, Genovese v. United States, 363 U.S. 858, 80 S.Ct. 1610, 4 L.Ed.2d 1739.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed.R.Crim.P., and put forth, as grounds for their motions; (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada;

(4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F.Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F.Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed.R. Crim.P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of

Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Government's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the non-production of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Appendix A—Opinion of the United States Court of Appeals

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U.S.C. § 3500 had they been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See Rosenberg v. United States, 360 U.S. 367, 370, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). We cannot say that Judge Murphy's findings with respect to these materials were erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occasion * * * would simply add umber to an already blackened witness." 200 F.Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in Rosenberg v. United States, supra, and United States v. Consolidated Laundries Corp., 291 F.2d 563 (2 Cir., 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials by their failure to demand these materials, or to

object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U.S.C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U.S.C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is

no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U.S.C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U.S.C. § 3500. In so arguing, the Government relies principally upon Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and the public policy reflected therein. Hickman v. Taylor, however, was

concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. Saunders v. United States, —— F.2d —— (D.C.Cir.1963).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this

portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U.S.C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500 (e) (2). The statement must fairly be "the witness' own words." Palermo v. United States, 360 U.S. 343, 352, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

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1. Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in Palermo v. United States, 360 U.S. 343, 354-355, 79 S.Ct. 1217, 1226, 3 L. Ed.2d 1287 (1959), it is "the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen different sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

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2. This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself, relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F.Supp. at 557.

Appendix A—Opinion of the United States Court of Appeals

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, affirmed.

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3. Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. See Judge Murphy's discussion, 200 F.Supp. at 714. In Palermo v. United States, 360 U.S. 343, 354, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

APPENDIX B

Judgment sought to be reviewed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment sought to be reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk